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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

The National Association For The Advancement of Colored People, Inc., et al.,

Appellants,

vs.

South Carolina, ex rel. Michael Roland Daniel, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

MOTION TO DISMISS

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ON APPEAL FROM THE
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FOR THE DISTRICT OF SOUTH CAROLINA

MOTION TO DISMISS

Pursuant to Rule 16.1(a) of the Rules of the Supreme Court of the United States, appellees Michael Roland Daniel, Rembert C. Dennis, and Marshall Williams, Robert J. Sheheen, Raymon Schwartz, Jr., and James B. Ellisor move the Court to dismiss the appeal herein on the ground that this appeal is not within the Court's jurisdiction.

Opinion Below

The July 31, 1984, opinion of the district court is set forth in appellants' jurisdictional statement at pages 3a to 51a. The July 31, 1984, order of the district court which is the subject of this appeal is set forth in appellants' jurisdictional statement at pages 51a and 52a. The order vacating the July 31, 1984, order of the district court and the opinion attached thereto are set forth in appellants' jurisdictional statement at pages 53a through 63a.

Jurisdiction

This appeal is not within the jurisdiction of the Court. No statute permits this appeal directly from the

district court. No statute or constitutional provision permits this appeal from an order that has been vacated by the district court.

Constitutional and Statutory Provisions Involved

The pertinent provision of the United States Constitution, Article III, Section 2, Clause 1, is set forth in appellants' jurisdictional statement at 2. The pertinent statutory provisions, 28 U.S.C. § 1253 and 42 U.S.C. § 1973c, are set forth in Appendices A and B to appellees' motion to dismiss.

Statement of the Case

Appellees Dr. George Graham, H. Sam Stilwell, and W. Richard Lee instituted this action on June 13, 1984, against certain named state officials to obtain a court ordered interim reapportionment plan for the South Carolina Senate so that elections could be held for these offices in 1984.[1] The NAACP and several of its members intervened as plaintiffs and Joe Wilder intervened as a defendant. The district court set an expedited

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[1]The General Assembly of South Carolina had passed a permanent statutory plan and submitted it to the District Court for the District of Columbia for preclearance under 42 U.S.C. § 1973c in 1983. That court had scheduled the trial for October 22, 1984, a date too late for elections to be held under the statutory plan in 1984.

schedule for filing of briefs on the issues raised in the pleadings and for proposed reapportionment plans. The district court, after determining that it should exercise its equitable jurisdiction to adopt a plan for use in Senate elections in 1984, received the plans of parties to the suit. None of the plans presented were the same as the statutory plan then under consideration for Section 5 preclearance in the District Court for the District of Columbia.

The district court held a trial on the merits on July 26, 27, and 30, 1984. The Court gave each party an opportunity to present proposed plans for use in the 1984 elections and to present whatever evidence he desired in support of his plan and in opposition to all other parties' proposed plans.

On July 31, 1984, the district court entered an order which adopted an interim reapportionment plan for the South Carolina Senate and which set a schedule to enable the State to hold Senate elections in 1984.[2] Along with that order the district court filed an opinion which explained the reasons that the Court had decided to exercise its equitable jurisdiction in the manner it did. Subsequent to the district court's adoption of an interim reapportionment plan, the General Assembly of South Carolina passed and the Governor signed S. 1093 adopting a permanent reapportionment plan for the

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[2]That schedule provided for candidate filing to begin on August 13, 1984, and squeezed all other necessary steps into the time remaining prior to the general election date.

South Carolina Senate and a schedule of elections for 1984 only. Act 626 of 1984. The Attorney General granted Section 5 preclearance to the plan but objected to the schedule for 1984 Senate elections contained in the Act, J. S. App. 57a, a schedule identical to the one contained in the district court's order.

Thereafter, defendants Daniel, Dennis, and Williams moved the district court to vacate its order that 1984 Senate elections be held under the interim court-adopted plan to permit the 1984 elections to proceed under Act 626. Since the Attorney General had objected to the schedule contained in Act 626, which was identical to the schedule in the district court's July 31, 1984 order, Daniel, Dennis, and

Williams also moved the court to amend the schedule in the July 31, 1984 order.[3]

The district court vacated that part of the July 31st order which adopted an interim plan, thereby permitting the plan in Act 626 to be used in 1984, and amended the schedule to provide new deadlines for the conduct of Senate primaries and preparation for the general election in 1984.

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[3] Insufficient time remained to recall the General Assembly, introduce and pass a new statutory schedule and have it precleared in time for the senate elections to be held on the general election day in 1984.

Argument

1. This appeal should be dismissed since appellants admit that the order appealed herein has been vacated and thus any action by this Court is an advisory opinion.

In their jurisdictional statement appellants admit that the order they seek to appeal has been vacated and superseded by a subsequent order of the same court and that their appeal is therefore moot. J.S. 12-13, 15. Appellants nevertheless wish to appeal the opinion of the district court that was filed with the vacated order, an opinion which is neither part of, nor related to, any extant order of the district court.

No operative portion of the July 31, 1984, order remains. The

decree contained in the July 31, 1984, order has been vacated or superseded in its entirety by the August 13, 1984, order. Consequently, no appeal of the vacated July 31, 1984, order is necessary or appropriate. Battle v. Anderson, 708 F.2d 1523 (10th Cir. 1983), cert. dismissed, ____ U.S.____, 104 S. Ct. 1019 (1984); Theodoropoulos v. Thompson-Starrett Co., 418 F.2d 350, 353, (2d Cir. 1969), cert. denied, 398 U.S. 905 (1970).

Appellants seek to avoid this compelling conclusion by stating that parts of the July 31, 1984, order were not vacated by the district court. That contention is manifestly erroneous. Neither component of the July 31, 1984, order remains to be executed. The plan was vacated and the schedule was amended.

Appellants confuse the concepts "order" and "opinion." The terms are not synonymous. An order is a directive issued by a court to the parties. An opinion is a court's statement of reasons for its order or judgment. Rogers v. Hill, 289 U.S. 582, 587 (1933). The parts of the July 31st opinion that appellants contend were not vacated are not part of the district court's order but are merely reasons that explain its order.

Appellate courts review judgments, decrees, and orders, not mere opinions or statements of reasons for orders. United States v. Ferreira, 13 How. 40, 14 L. Ed. 42 (1851); Highland Supply Corp. v. Reynolds Metals Co., 327 F. 2d 725, 729 (8th Cir. 1964). This appeal should be dismissed because the order of July 31

no longer remains for this Court to review. Review of the opinion is not a judicial function, United States v. Ferreira, 13 How. at 47. Review of the vacated order would be purely hypothetical.

In their insistence on this appeal of a vacated order, appellants ask this Court to violate a principle articulated by the first Chief Justice of this Court: a prohibition against advisory opinions. Issuance of opinions unrelated to a controversy between two parties is not a judicial function and accordingly will not be performed by the Court. Correspondence and Public Papers of John Jay, 486 (1891). This fundamental limitation on action by the Court, derived from Article III, Section 2, Clause 1, has been consistently and repeatedly

adhered to in the nearly two centuries since Chief Justice Jay declined Secretary of State Jefferson's invitation to express the Court's views on hypothetical issues. E.g., North Carolina v. Rice, 404 U.S. 244 (1971), Muskrat v. United States, 219 U.S. 346 (1911); Hayburn's Case, 2 Dall. 409, 1 L. Ed. 436 (1792).

When an issue is not moot, it involves a substantial controversy of "immediacy and reality," Golden v. Zwicker, 394 U.S. 103, 108 (1969), which "admit[s] of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be on a hypothetical state of facts." Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 241 (1937). Since the district court's order has been

vacated, a decree of this Court would have no effect on the parties. Appellants concede that the August 13, 1984, order, which vacated the July 31, 1984, order, rendered this appeal moot. J.S. 15. The import of the appeal becoming moot is that all allegations of error in the district court's reasoning behind its order are also moot. Battle v. Anderson, 708 F. 2d at 1527.

"Mootness is a jurisdictional question because the Court 'is not empowered to decide moot questions or abstract propositions.'" North Carolina v. Rice, 404 U.S. at 246, quoting United States v. Alaska S. S. Co., 253 U.S. 113, 116 (1920). The lack of power to review moot issues results from the prerequisite in Article III, Section 2, Clause 1 that judicial power be exercised only in a case or contro-

versy. North Carolina v. Rice, 404 U.S. at 246. By admitting that this appeal is moot, appellants admit this Court's lack of jurisdiction to hear this appeal. North Carolina v. Rice, 404 U.S. at 246.

2. This appeal should be dismissed for want of jurisdiction as the order objected to is not final and none of the cited statutes confers jurisdiction in this Court.

Appellants have appealed this case directly from a three judge district court in South Carolina. No statute permits them to by-pass the Fourth Circuit Court of Appeals and bring this appeal directly to this court. Furthermore, appellants have taken this appeal from a conditional,

interim order of a three judge district court. No authority exists to permit the appeal of such a non-final order to either this court or the circuit court of appeals.

"The general principle of federal appellate jurisdiction, derived from the common law and enacted by the First Congress, requires that review of nisi prius proceedings await their termination by final judgment." Di Bella v. United States, 369 U.S. 121, 124 (1962). Absent an express statutory exception, only final judgments and final decrees may be appealed. Baltimore and Ohio R.R. Co. v. Interstate Commerce Commission, 215 U.S. 216 (1909). The July 31, 1984, order is not a final judgment from which an appeal may be taken.

To be final a judgment "must terminate the litigation between the parties on the merits of the case, so that, if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree which had been rendered." Benjamin v. DuBois, 118 U.S. 46, 48 (1886). In this case, as in Benjamin v. DuBois, the order at issue is not one which could be executed if it were affirmed. The final order in this case, which has been implemented, was filed August 13, 1984, and effects completely different relief from the July order. The July 31, 1984, order is clearly not a final order and, therefore, is not within this Court's jurisdiction. Baltimore and Ohio R.R., 215 U.S., 216.

Appellants seek to deprive the Court of several of the advantages of the final judgment rule by appealing a vacated order. The mootness that resulted from subsequent circumstances in this case is a common occurrence that works to the advantage of appellate courts by eliminating the need for many appeals. Wright and Miller, Federal Practice and Procedure: Civil Section 3907 at 432. The finality requirement and prohibition against piecemeal appeals is intended to "discourage undue litigiousness and leaden-footed administration of justice," Di Bella v. United States, 369 U.S. at 124. This appeal of an order that has been vacated is an excellent example of undue litigation that clogs the judicial system.

Moreover, no statute confers jurisdiction on the Court to hear this appeal directly from the district court. Neither statute cited by appellants in favor of jurisdiction is applicable. Section 1253 of Title 28 permits direct appeals to this Court only from orders of three judge courts that grant or deny injunctions. Since the July 31, 1984, order has been vacated, it neither grants nor denies an injunction. Accordingly, this Court has no power under 28 U.S.C. § 1253 to accept this appeal. Gunn v. University Committee, 399 U.S. 383, 390 (1970).

No jurisdiction exists under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, either. Section 5 confers jurisdiction on the District Court for the District of Columbia, but no other district court, for the

purpose of issuing declaratory judgments concerning the purpose and effect of voting changes, and confers jurisdiction on this Court to hear direct appeals of such declaratory judgment actions. 42 U.S.C. § 1973c.

This is not a Section 5 declaratory judgment action and is not on appeal from the District of Columbia. The South Carolina district court has no jurisdiction under Section 5. Section 5 grants exclusive jurisdiction of actions thereunder to the district court in the District of Columbia. 42 U.S.C. § 1973c. Jurisdiction for the district court in South Carolina to enjoin violations of Section 5 is conferred only by 42 U.S.C. § 1973j(d) and that section does not provide for direct appeals to this Court. Accordingly, the Voting Rights

Act does not, in Section 5 or elsewhere, confer jurisdiction on this Court to hear a direct appeal from a three judge district court in the District of South Carolina. But see Allen v. State Bd. of Elections, 393 U.S. 544 (1969).

The requirement that this matter be heard by a district court of three judges is contained not in Section 5 of the Voting Rights Act, as the district court erroneously concluded, but in 28 U.S.C. § 2284. That section also does not permit direct appeals to this Court. If the July 31st order were a final order, the appeal would lie to the Fourth Circuit Court of Appeals, not directly to this Court from the district court.

3. This appeal should be dismissed because it seeks relief that is either redundant or which appellants should have obtained by prompt action in the Court below but did not.

The finality requirement also permits district courts the opportunity to correct mistakes since ordinarily only the final order in a case is appealable. In this case, the district court, having recognized that reapportionment is primarily a legislative function, foresightfully provided that if a statutory plan became available before candidate filing began under the court's interim plan, the parties could ask that its order be vacated. J.S. App. 51a-52a. The contemplated condition occurred and the district court vacated its plan on August 13, 1984.

The district court also superseded the remainder of its July 31, 1984, order, which had provided a schedule for 1984 Senate elections under the court-adopted plan, with an entirely new schedule for use with the permanent statutory plan. J.S. App. 53a et. seq. This Court would serve no judicial purpose and waste judicial resources by accepting this appeal from a conditional interim order that the district court has already vacated. The relief sought here is redundant. The order of July 31 having been vacated and superseded the opinion which supported its conclusion is of no effect. To reason otherwise is to grant to the district court the power to render advisory opinions.

Appellants cite no case that suggests they are entitled to the

relief requested. Each of the cases they cite on page 16 of their jurisdictional statement involves an appeal from a final order or judgment, which remained extant at the time of the appeal. Appellants seek to appeal from a conditional interim order which has been vacated by the court below. Each of the cases they cite had become moot between the time judgment was entered and the appeal was heard. This case is not moot; only the issue of the July 31, 1984, order is moot. Therefore, the relief granted in the cases appellants cite, remand with directions to dismiss the action, is inappropriate.

Moreover, the relief appellants seek should be denied for the same reason that remand was denied in United States v. Munsingwear, 340 U.S.

36 (1950), the case upon which they principally rely. Appellants, like the United States in Munsingwear, could have asked the district court for the relief they seek from this Court. They failed to take advantage of that available remedy. Appellants, having slept on their rights, now want this Court to do for them what they could have done for themselves. United States v. Munsingwear, 340 U.S. at 40-41. As this Court concluded in Munsingwear, the request should be denied.

Conclusion

This appeal is a waste of judicial resources. It is the epitome of the kind of piecemeal litigation this Court has consistently refused to permit, and exemplifies the reasons this Court generally reviews only final orders of the lower courts. The issue herein is moot, by appellants' own admission. Appellants seek from this Court an advisory opinion on hypothetical questions. Jurisdiction to hear this appeal is not conferred by any statute and is precluded by the limitations in Article III, Section 2, Clause 1 of the Constitution.

Appellees Daniel, Dennis, and Williams, Sheheen, Schwartz, and Ellisor respectfully submit that this

Court lacks jurisdiction to hear this appeal and, therefore, appellees' motion to dismiss should be granted.

Respectfully submitted,

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Appendix A

28 U.S.C. § 1253. Direct appeals from decisions of three judge courts

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

Appendix B

42 U.S.C. § 1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard practice, or procedure with respect to

voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to

voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification,

prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement

of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.